No. 78-1399

In the

Supreme Court of the United States

OCTOBER TERM, 1978

CHICAGO-MIDWEST MEAT ASSOCIATION,
a not-for-profit corporation,

Petitioner,

v.

CITY OF EVANSTON, a municipal corporation, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Chicago-Midwest Meat Association, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 14, 1978. The abbreviated caption of this petition omits the names of the remaining eleven respondents. They are: Village of Skokie, a municipal corporation, Village of Niles, a municipal corporation, Village of River Forest, a municipal corporation, City of Des Plaines, a municipal corporation, City of Elgin, a municipal corporation, City of Chicago Heights, a municipal corporation, Village of Oak Park, a municipal

corporation, Village of Morton Grove, a municipal corporation, Village of Norridge, a municipal corporation, City of Highwood, a municipal corporation, and Village of Lake Zurich, a municipal corporation.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The unreported Memorandum Opinion and Order rendered by the District Court for the Northern District of Illinois, Eastern Division, appears there also.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 14, 1978. Rehearing was not sought. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether certain municipal ordinances requiring local inspection of meat delivery vehicles that are inspected daily by federal inspectors pursuant to the Wholesome Meat Act are unconstitutional under the Supremacy Clause because they supersede, override or conflict with that Act and the regulatory scheme promulgated thereunder.

2. Whether Congress intended to restrict the scope of the explicit pre-emption provision of the Wholesome Meat Act to prohibit only state regulation of that part of commerce that occurs on the "premises" of an official establishment when the statutory language imposes an absolute prohibition against state regulatory requirements with respect to "premises, facilities and operations" of such

an establishment which are "in addition to, or different than" those made under the Act.

3. Whether the Court of Appeals erred in construing local ordinances referred to in the complaint, copies of which were not even before the Court or available to it, without remanding the case so that evidence could be taken on the issue of the interpretation and application of those ordinances by local officials.

4. Whether the Court of Appeals erred when it held that the complaint did state a claim upon which relief could be granted, but then went on to hold that the District Court's error in dismissing the case for that reason was of no consequence.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDINANCES INVOLVED

United States Constitution, Article VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code, Title 21 § 624

The Secretary may by regulations prescribe conditions under which carcasses, parts of carcasses, meat, and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, capable of use as human food, shall be stored or otherwise handled by any person, firm, or corporation engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or im-

porting, such articles, whenever the Secretary deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Violation of any such regulation is prohibited. However, such regulations shall not apply to the storage or handling of such articles at any retail store or other establishment in any State or organized Territory that would be subject to this section only because of purchases in commerce, if the storage and handling of such articles at such establishment is regulated under the laws of the State or Territory in which such establishment is located, in a manner which the Secretary, after consultation with the appropriate advisory committee provided for in section 661 of this title, determines is adequate to effectuate the purposes of this section.

United States Code, Title 21 § 678

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Sec-

retary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Code of Federal Regulations, Chapter 9 § 308.9

Products shall be protected from contamination from any source such as dust, dirt, or insects during storage, loading, or unloading at and transportation from official establishments.

Code of Federal Regulations, Chapter 9 § 325.1(c)

No person, engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, meat or meat food products capable of use as human food, or importing such articles, shall transport, offer for transportation, or receive for transportation in commerce or in any State designated under § 331.2 of this subchapter, any such meat or meat food product which is capable of use as human food and is not wrapped, packaged, or otherwise enclosed to prevent adulteration by airborne contaminants, unless the railroad car, truck, or other means of conveyance in which the product is contained or transported is completely enclosed with tight fitting doors or other covers for all openings. In all cases, the means of conveyance shall be reasonably free of foreign matter (such as dust, dirt, rust, or other articles or residues), and free of chemical residues, so that product placed

therein will not become adulterated. Any cleaning compound, lye, soda solution, or other chemical used in cleaning the means of conveyance must be thoroughly removed from the means of conveyance prior to its use. Such means of conveyance onto which product is loaded, being loaded, or intended to be loaded, shall be subject to inspection by an inspector at any official establishment. The decision whether or not to inspect a means of conveyance in a specific case, and the type and extent of such inspection shall be at the Program's discretion and shall be adequate to determine if product in such conveyance is, or when moved could become, adulterated. Circumstances of tarnsport that can be reasonably anticipated shall be considered in making said determination. These include, but are not limited to, weather conditions, duration and distance of trip, nature of product covering, and effect of restowage at stops en route. Any means of conveyance found upon such inspection to be in such condition that product placed therein could become adulterated shall not be used until such condition which could cause adulteration is corrected. Product placed in any means of conveyance that is found by the inspector to be in such condition that the product may have become adulterated shall be removed from the means of conveyance and handled in accordance with § 318.2(d) of this subchapter.

Code of the City of Evanston § 19-1, License:

It shall be unlawful for any person, firm or corporation to operate within the city, a retail grocery or market, candy or confectionery store, or to operate a "food vehicle" as defined herein, within the city, without first having obtained a license for that purpose as provided in this ordinance.

Code of the City of Evanston, § 19-2 Definitions:

(3) Food Vehicle, shall include all wagons, motor vehicles and vehicles propelled by human power for the storage or transportation of food, food products, milk and beverages intended for human consumption, including all vehicles operated in connection with the wholesale distribution of meats, vegetables and all food products, but excepting delivery vehicles operated by a grocery or market as herein defined.

Code of the City of Evanston, § 19-4 Inspection of Food Vehicles:

All food vehicles, as defined in this ordinance, shall be kept in a clean and sanitary condition. It shall be the duty of the Director of Public Health to make or cause to be made such inspections as may be necessary to insure all food vehicles transporting food or beverages are kept in a clean and sanitary condition.

Code of the City of Evanston, § 19-5 License Fees:

(c) The annual license fee for each food vehicle as defined herein, excepting delivery vehicles operated by a grocery or market within the City of Evanston shall be $20.

STATEMENT OF THE CASE

A. Nature of the Case:

This action was commenced by the filing of a verified complaint for Declaratory and Injunctive relief against twelve Illinois municipalities located in Cook and neighboring counties. All were alleged to have enacted and attempted enforcement of certain ordinances which regulate member companies of plaintiff in a field pre-empted

by the federal Wholesome Meat Act of 1967. All defendants joined in a motion to dismiss the complaint under Rules 12(b) and 19 of the Federal Rules of Civil Procedure. A cross-motion for a Preliminary Injunction was filed by plaintiff. After both motions were fully briefed, but without an evidentiary hearing, plaintiff's motion for a Preliminary Injunction was denied and defendants' motion to dismiss was allowed in a Memorandum Opinion and Order entered March 13, 1978. This appeal was taken to the Court of Appeals for the Seventh Circuit. In an opinion handed down December 14, 1978, the Court of Appeals affirmed the District Court while holding it was error to dismiss for failure to state a claim upon which relief can be granted.

B. Statement of Facts:

A summary of the allegations contained in the verified complaint and the various affidavits submitted in support of the cross-motion for Preliminary Injunction should suffice since an evidentiary hearing was not conducted and no pleadings were filed by the defendants.

Plaintiff is an Illinois not-for-profit corporation with its membership limited to persons, firms or corporations that have an established place of business located in the Chicago-Midwest region; that are engaged in the business of wholesaling meat food products capable for use as human food. All members are subject to or governed by the federal Wholesome Meat Act of 1967 and the regulations adopted pursuant thereto. By this action, the plaintiff seeks to enforce the substantive rights of its members.

Members of the plaintiff-association are known as "official establishments" as that term is defined in Paragraph (i) of Section 301.1, Chapter 9, Code of Federal Regulations. These members have obtained a license to engage

in this business from the United States of America, Department of Agriculture, and have conformed to and complied with all of the statutes and regulations that relate to manufacturing, processing and sale of meat food products.

Pursuant to Article 1, Section 8, of the Constitution of the United States, and Section 678 of Title 21, United States Code, the Congress of the United States has entered and pre-empted the entire field in reference to the regulation and inspection of premises, facilities and operations of any establishment which is subject to the Wholesome Meat Act of 1967, provided, however, that state and local regulations may be imposed on such premises, facilities and operations if they are *not* in addition to, or different from, those made under the Wholesome Meat Act.

Pursuant to his authority to regulate and inspect the premises, facilities and operations of all official establishments, the Secretary of Agriculture has promulgated and adopted the regulation that appears at Section 308.9 in Chapter 9 of the Code of Federal Regulations. That regulation provides as follows:

> §308.9 PROTECTIVE HANDLING OF PRODUCTS.
>
> Products shall be protected from contamination from any source such as dust, dirt, or insects *during storage, loading, or unloading at and transportation from official establishments.* [Emphasis added]

At all times relevant hereto, the Secretary of Agriculture has taken over the field of inspection of all premises, facilities and operations of official establishments, and of the transportation of meat food products to market, including the inspection of trucks used to transport meat from the official establishments to market, and the loading and unloading of same. The defendants, and each of them, have

attempted to enforce certain ordinances which are different from, or in addition to, the regulations of the Secretary of Agriculture and hence which tend to override, supersede or otherwise nullify those regulations. In an effort to enforce those ordinances, charges have been filed or have been threatened by the defendants, and each of them, against certain members of the plaintiff for failure to purchase and display a local municipal license which can be obtained only after submitting their trucks to an inspection in addition to, or different from, that required under the Wholesome Meat Act and the payment of a fee.

The meat which is purchased by the various members of the plaintiff is transported to the members of the plaintiff in interstate commerce. The various members of the plaintiff then process the meat and ship it to persons, firms and corporations both within and without the State of Illinois. All of the unprocessed meat bought or acquired by the members of plaintiff enters into the stream of interstate commerce from the time it leaves its point of origin, and remains in said stream until delivery of the finished meat food product is accepted by the ultimate purchaser of that product.

Even though the Secretary of Agriculture has exclusively occupied the field of regulation and inspection of official establishments, their operations and premises, the officers and agents of the City of Evanston have construed an Evanston ordinance to authorize them to enter and inspect delivery vehicles used by the members of the plaintiff and to license those vehicles only upon satisfactory completion of the inspection and payment of a stated fee. This City of Evanston ordinance is in direct contravention of the plain language of Section 678 of Title 21 of the United States Code and Section 308.9, Chapter 9, Code of Federal Regulations, in that it is an attempt to impose a requirement in addition to, or different from, those provided for under the Wholesome Meat Act.

The plaintiff is informed and believes that the remaining named defendants have construed their respective city and village codes to authorize them to enter and inspect the delivery vehicles of the plaintiff's members and to license those vehicles only upon satisfactory completion of the inspection and payment of a stated fee. All of these ordinances are in direct contravention of the plain language of Section 678, Title 21 of the United States Code and Section 308.9, Chapter 9, Code of Federal Regulations.

All of the defendants have either brought complaints to enforce the ordinances in question or threatened to do so.

Unless the defendants are enjoined and restrained, they will continue to inspect all vehicles used by the plaintiff's members to transport meat food products and to seek fines for failure to obtain and display licenses, all of which will subject the members of plaintiff to great expense, annoyance and inconvenience in their efforts to conduct their business and to market their meat food products in interstate commerce.

All of the acts complained of by the plaintiff in its complaint have been made by the officers, agents and employees of defendants under the alleged or pretended authority claimed by them to be in the laws of the State of Illinois and the municipal code of the city or village which they purport to represent, and amendments relating thereto.

In support of the motion for preliminary injunction four separate affidavits containing identical averments were filed. In substance, those affidavits state that the members of the plaintiff-association which are licensed by the United States of America are inspected by persons employed by

the United States Department of Agriculture in order to implement and carry into effect the regulations and policies of that department; that these inspectors conduct a daily inspection of all trucks and other vehicles used by the members of the plaintiff to transport from their premises and to deliver to retail outlets the various meat food products which are wholesaled by the respective members of the plaintiff-association; that in addition to the daily inspections of these trucks by the Department of Agriculture, all of the named defendants have construed their respective ordinances to authorize them to conduct an independent and duplicative inspection of the same trucks.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the decision of this Court as to the scope and application of the explicit pre-emption provision of the Wholesome Meat Act.

In *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 (1977), this Court interpreted and applied the explicit pre-emption provision of the Wholesome Meat Act. Section 408 of the Act provides in part:

> Requirements within the scope of this Chapter with respect to *premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this Chapter, which are *in addition to, or different than* those made under this Chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. 21 U.S.C. § 678 [Emphasis added].

In construing that Section, this Court held that the state statute under review was pre-empted because it contained

requirements "different than" those found in the federal regulations promulgated under the Act.

In that case a California weight labeling statute required that labels appearing on packaged meats state the net weight of the article, and that the actual net weight at the time of sale be not less than that stated on the package. Reasonable variations between the actual net weight at time of sale and the stated net weight were allowed only if they arose from gain or loss of moisture during the manufacturing process. The federal weight labeling regulation, however, allowed for reasonable variations from the gain or loss of moisture both during the manufacturing process and during the course of good distribution practices. The failure of the state regulation to take both sources of weight variation into account was held to be a state requirement "different than" the federal standard and therefore pre-empted by the Act.

The Court of Appeals in the case at bar sought to distinguish its holding from *Jones* by stating that both the state statute and the Act in that case regulated the same thing, meat labeling, whereas "federal law is silent on the subject of state regulation, [of] the condition of delivery vehicles away from the premises of regulated establishments" (p. 11, Fn. 7, of the Court's opinion). But this statement is belied by Section 24 of the Act (21 U.S.C. § 624) and the regulations implementing that section. Section 24 of the Act provides:

> The Secretary may by regulations prescribe conditions under which . . . meat, and meat food products . . . capable of use as human food, shall be stored or otherwise handled by any person, firm, or corporation engaged in the business of buying, selling, freezing, storing, *or transporting, in or for commerce,* or importing, such articles, whenever the Secretary deems

such action necessary to assure that such articles will not be adulterated or misbranded *when delivered to the consumer.* Violation of any such regulation is prohibited. However, such regulations shall not apply to the storage or handling of such articles at any retail store or other establishment in any State or organized Territory that would be subject to this section only because of purchases in commerce, if the storage and handling of such articles at such establishment is regulated under the laws of the State or Territory in which such establishment is located, in a manner which the Secretary, after consultation with the appropriate advisory committee provided for in section 661 of this title, determines is adequate to effectuate the purposes of this section. 21 U.S.C. § 624 [Emphasis added].

9 C.F.R. § 308.9 provides:

> Products shall be protected from contamination from any source such as dust, dirt, or insects *during storage, loading, or unloading at and transportation from official establishments.* [Emphasis added]

And 9 C.F.R. § 325.1(c) deals specifically with sanitary conditions to be maintained in delivery vehicles during the transport of articles subject to the Act. The only thing that federal law is silent on is the question of whether inspections to insure compliance with these requirements are to be conducted off the premises of a regulated establishment as well as on the premises. To say that because federal law is silent on the subject of enforcement of off-premises sanitary standards for delivery vehicles it follows that such standards do not exist is a non sequitur. Reduced to its simplest terms, this is precisely what the Court below has done. Accordingly, the attempt to distinguish the case at bar from the holding of this Court in *Jones* is based on a false premise. Once this is understood, there can be little doubt that the holding of the Court below is in conflict with this Court's holding in *Jones* as to

the application of the explicit pre-emption provision of the Act.

The decision below is also in conflict with this Court's holding in *Jones* regarding the scope of § 408 of the Act. To fully understand this more subtle conflict, a brief discussion of the difference between explicit and implicit pre-emption is necessary. As this Court stated in *Jones,* whenever it can be said that Congress "unmistakably . . . ordained" that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. (430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed. 2d 604, 614)

Of course, there are many different explicit pre-emption provisions that can be found in the various Acts of Congress. In *Jones,* two such provisions were discussed—that found in the Wholesome Meat Act, and that of the Fair Packaging and Labeling Act (15 U.S.C. § 1451). The Court also discussed the implicit pre-emption features of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 1451), which contains no pre-emptive language. (These latter Acts were discussed in connection with a related case that had been consolidated into the *Jones* case and which was referred to as the "Millers" case.) The pre-emption language of the Fair Packaging and Labeling Act was quoted as follows (p. 538):

> It is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section

1453 of this title or regulations promulgated pursuant thereto. 15 U.S.C. § 1461.

This Court then concurred with the Court of Appeals that "this section leaves more scope for state law than does the WMA (Wholesome Meat Act)" (p. 538). And again, in referring to the Fair Packaging and Labeling Act, this Court noted that "respondents attribute to the ban on requiring different information a broad meaning, similar in scope to the pre-emption provision of the WMA (Wholesome Meat Act)" (p. 540).

The implicit pre-emption test was then interpreted as leaving a broader scope for state regulation than any explicit pre-emption test. The Court stated: "[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress . . . This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the Courts" (p. 525). The test to be applied for implicit pre-emption was thus stated "whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (pp. 540-541). Three different levels or degrees of pre-emption were discussed in *Jones,* therefore, with the highest or most restrictive of state regulation being the explicit pre-emption provision of the Wholesome Meat Act, and the lowest or least restrictive of state regulation being implicit pre-emption. Thus it is clear that the greatest freedom of action will be allowed the states in a federally regulated field when the test for implicit pre-emption is applied.

In the case at bar, a careful reading of the opinion of the Court of Appeals discloses a subtle shift from application of the broad explicit pre-emption provision to the

narrow implicit pre-emptive test, followed by reasoning that since pre-emption does not exist under that narrow test, it cannot exist under any test. Yet it is clear that many state regulations that do not run afoul of the implicit pre-emption test because they are consistent with the "full purposes and objectives of Congress" in enacting a particular bill would nevertheless violate the explicit pre-emption provision of the Wholesome Meat Act. State regulation of the premises, operations and facilities of official establishments that are "in addition to, or different" from those adopted under the Act are impermissible whether consistent with the "full purposes and objectives of Congress" or not. The Court of Appeals seems to reject this approach by finding state regulations that reinforce or bolster federal regulations under the Act to be permissible regardless of the plain language of § 408. Perhaps the Court merely mistakenly applies the implicit pre-emption test when discussing broad explicit pre-emption. It is not clear from the opinion. It is submitted, however, that the Court brought to bear the test giving the greatest latitude to state regulation when it should have applied the test laid down by this Court in *Jones* for application of § 408. For this additional reason, the decision below is in conflict with this Court's holding in *Jones.*

2. The decision below raises significant and recurring problems concerning the meaning and effect of all pre-emption clauses written in terms similar to those of the Wholesome Meat Act, and the breadth of the field in which federal regulation will be allowed to operate free of state and local interference.

By construing § 408 of the Act the way in which it did, the Court of Appeals either negated the words "facilities and operations" or elected to treat them as mere surplusage. In the second full paragraph on page 8a of the Court's opinion in the Appendix, after quoting the first sentence

of § 408 of the Act, the statement appears: "This language demonstrates that state regulation 'in addition to, or different' from the federal scheme is impermissible *only on the site of the regulated establishment.*" [Emphasis added.] It is submitted that the language of § 408 not only fails to support the Court's interpretation, it contradicts it! The Court's wholly unsupported and unwarranted conclusion strikes at the heart of the Act by narrowly construing the very language designed to insulate the entire federal regulatory scheme from local interference. This interpretation invites local regulation of off-premises activities and operations already subject to federal regulation.

It does violence to the language to hold that the delivery of meat to market is not one of the "operations" of an official establishment, and that a truck used for that purpose is not one of its "facilities". If only those operations and facilities that exist on the premises were meant to be included by this provision, there would be no need to add these words after the word "premises". Did Congress really intend for these words to be nothing more than meaningless surplusage? If it is clear that the federal regulatory scheme was designed to follow the product to the very point of sale to the ultimate consumer, is there any reason to believe that the pre-emption provision of § 408 should have a shorter reach? Section 624 clearly provides for the regulation of the transportation of meat and meat food products whether from official establishments or otherwise. Why then should the protection afforded the federal regulatory scheme by the pre-emption provision of § 408 extend no further than the four walls of an official establishment? Did Congress really intend to legislate a comprehensive regulatory plan, only to leave a large part of it vulnerable to attack by state and local authorities?

In the face of a statute prohibiting regulations that are "in addition to, or different" from federal regulations, it is not a sufficient answer to say that as long as the *stated* purpose of conducting a local inspection is laudable, it is permissible. A *duplicative* inspection to determine whether a *different* standard for cleanliness and sanitation has been met is nevertheless prohibited.

By making the four walls of an official establishment the artificial boundaries of federal pre-emption, the Court of Appeals has also nullified the words "in addition to" in § 408 of the Act. That this is so can be seen by asking under what circumstances will a state regulation be pre-empted as being "in addition to" a federal regulation if states are free to regulate all operations and facilities of official establishments beyond their premises. It is submitted that the answer compelled by the holding below is "none". Once again, the construction given § 408 by the Court of Appeals leads to results neither foreseen nor intended by Congress.

The Court of Appeals' analysis of the legislative history of § 408 of the Act is also fatally flawed. The Court quoted from the report of the Senate Committee on Agriculture and Forestry that pertained to what later became § 408 of the Act. The following is a complete quote of the language appearing in the report dealing with § 408:

> Section 408 would exclude States, territories, and the District of Columbia from regulating operations at plants inspected under title I or from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the act, but would permit them to impose recordkeeping and re-

lated requirements with respect to such plants if consistent with the Federal requirements and to impose requirements consistent with the Federal provisions as to other matters regulated under the act. S. Rep. No. 799, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code Cong. & Ad. News 2188, 2207.

Based on this language, the Court of Appeals stated in the first paragraph on page 9a of its opinion in the Appendix:

> The Senate Committee's commentary *clearly indicates that the states may regulate meat delivery vehicles not on the premises of the regulated establishments* so long as the state law is not inconsistent with the Act —that is, so long as it does not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'. [Emphasis added.]

It is submitted that nothing of the sort is indicated by the quoted language. The Court below read something into the language that is simply not there. It concluded that since states are barred from regulating operations at plants, and since *nothing was said* on the subject of regulating operations off the premises of those plants it follows that states are free to regulate such operations. The fallacy in this logic is apparent. It does not follow to say that "all acts not prohibited are therefore permissible". The failure to discuss operations occurring off the premises of an official establishment cannot be interpreted as either an approval or disapproval of state regulation of those operations. The language in the Senate Committee report is neutral, therefore, on the issue raised in this case.

In the first full paragraph on page 8a of its opinion in the Appendix the Court below characterizes the construction ascribed to the term "operations" by the petitioner so as to include related activities that are removed

from the geographical confines of the plant's premises as being "expansive". On the contrary, the meaning ascribed to that term by the petitioner is no broader than the field of regulation envisioned by the Act. Is there any basis in law or in fact to believe that the scope of one should not be coextensive with the other? The true breadth of the regulatory field established by Congress regarding the transportation of meat and meat food products is suggested by that part of the Senate Committee report that pertains to § 24. It reads as follows:

> Section 13 of the bill would add new section 24 to the act authorizing the Secretary to issue regulations, when necessary to prevent adulteration or misbranding, prescribing the conditions under which carcasses, parts thereof, meat, and meat food products capable of use as human food, shall be stored or otherwise handled by persons engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or importing, such articles. Exception is made for retail stores and certain other establishments if they are adequately regulated under the laws of the State, Territory, or District of Columbia in which they are located. S. Rep. No. 799, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code Cong. & Ad. News 2188, 2203.

If regulation of the storage and handling of meat and meat food products when in the hands of persons transporting them in or for commerce is specifically authorized, how can it be that official establishments engaged in transporting their meat to market are neither under federal regulation nor protected from local interference by the pre-emption provision of the Act? Plainly, such activities are both regulated under the Act and embraced by § 408.

3. The decision below is a substantial departure from the accepted method of conducting judicial proceedings in that it first concedes the point relied upon for reversal but then decides the ultimate issue adversely to the petitioner without affording it an opportunity to fully brief and argue the point.

The District Court denied the petitioner's motion for a preliminary injunction and allowed the defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. On appeal, the primary issue urged upon the Court was the error in dismissing the case under Rule 12(b)(6). After reviewing the allegations of the complaint and taking them as true for purposes of ruling on the motion to dismiss, the Court of Appeals stated at the top of page 5a of its opinion in the Appendix:

> These allegations state a claim upon which relief can be granted. Therefore, the district court technically erred when it dismissed the complaint. That error is of no consequence, however.

The Court then went on to make the analysis sketched above. Neither the petitioner nor the respondents were given an opportunity to fully explore and brief the issues the Court dealt with. It is submitted that the petitioner was prejudiced by the Court's refusal to provide the parties that opportunity, and by its alleged construction of the ordinances of the last eleven named defendants, copies of which were not even before the Court. Moreover, the Court could know nothing of the application or enforcement of those ordinances by local officials since no evidence on that subject had been taken. This procedure is not in keeping with the accepted method of conducting judicial proceedings under our adversarial system, and the petitioner has been prejudiced by it.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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March 12, 1979

IN THE

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FOR THE SEVENTH CIRCUIT

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Plaintiff-Appellant,

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CITY OF EVANSTON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
77 C 3144—ALFRED Y. KIRKLAND, *Judge.*

ARGUED SEPTEMBER 26, 1978 — DECIDED DECEMBER 14, 1978

Before CUMMINGS, WISDOM*, and SPRECHER, *Circuit Judges.*

WISDOM, *Circuit Judge.* This appeal primarily turns on the question whether certain municipal ordinances are invalid because they are preempted by or in conflict with the Wholesome Meat Act of 1967, 21 U.S.C. § 601 *et seq.* We hold that the ordinances are not invalid under that Act. Nor do the ordinances contravene the commerce clause of the United States Constitution.

Chicago-Midwest Meat Association (the association) appeals the denial of its motion for a preliminary injunction and the dismissal of its complaint. We affirm.

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

I.

According to the complaint, the association brought this action on behalf of its members—persons, firms, or corporations located in Chicago or the Midwest engaged in manufacturing, processing, and wholesaling meat products appropriate for human consumption. The complaint alleges that all of the association's members are subject to the Wholesome Meat Act of 1967 (the Act), 21 U.S.C. §601 *et seq.*, and to the regulations promulgated by the Secretary of Agriculture under authority of the Act. The defendants named in the complaint are municipalities located in northern Illinois that allegedly have enacted ordinances authorizing inspection of meat delivery vehicles. The complaint charges that these ordinances are invalid because they are preempted by the Act.[1] In addition, the complaint suggests, but does not articulate, the contention that the ordinances might impose an impermissible burden on interstate commerce.

The district court determined that the ordinances in question did not conflict with the Act. It then denied the association's motion for a preliminary injunction against enforcement of the ordinances and granted the municipalities' motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

II.

The municipalities argue that the district court erred when it assumed that the association had standing to bring this action on behalf of its members. We disagree.

In *Hunt* v. *Washington Apple Advertising Commission*, 1977, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383, the Supreme Court provided a summary of the requirements for "organizational standing":

[1] The association does not challenge the authority of the municipalities to inspect the meat delivered by the vehicles operated by its members.

> [W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own behalf; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in a lawsuit.

See also 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 3531, 213-15 (1975) and 45-46 (1978 Supp.); 6A *Moore's Federal Practice* ¶ 57.11, 57-101 n.98 (1974 & 1977-78 Supp.).

The allegations in the complaint satisfy the three requirements identified in *Hunt*. First, the complaint alleges that health officials of the City of Evanston, one of the defendant municipalities, have stopped and inspected meat delivery trucks operated by members of the association and issued citations for failure to obtain and display municipal licenses required by the Evanston ordinances.[2] The complaint further alleges that the other

[2] During oral argument before this Court, counsel for the association was asked whether he knew of any specific instances in which officials of one of the Cities stopped and inspected a meat delivery vehicle operated by one of the association's members while it was en route to a delivery point. Though counsel could not cite any specific stop, he stated that he "believed" that at least one delivery vehicle operated by one or another of the members had been stopped and inspected. For purposes of this appeal, and for reasons explained in the remainder of this section of the opinion, we must treat counsel's belief as fact.

During oral argument, counsel for all parties agreed that no criminal charges for violation of these ordinances by delivery vehicles are pending against any of the members of the association. Therefore, the principles of abstention developed in *Younger* v. *Harris*, 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, do not apply to this case.

municipalities have inspected trucks as they were being unloaded at delivery points and have threatened enforcement of their ordinances. This specific pleading of actual and threatened harm would otherwise provide the association's members with standing to challenge the ordinances. *See Sierra Club* v. *Morton,* 1972, 405 U.S. 727, 738-40, 92 S.Ct. 1361, 31 L.Ed.2d 636. Second, it is clear that one of the purposes of the association, as with any trade association, is to promote the legal welfare of its members. Third, neither the claim that the association makes nor the declaratory and injunctive relief it requests requires the participation of its members in this suit.[3]

III.

According to the complaint, the delivery vehicle inspections carried out under the authority of the ordinances have injured the members of the association in the past and, unless enjoined, will continue to injure them in the future. The complaint alleges that the municipal officials conduct the inspections by stopping the vehicles while on their delivery routes or by examining them while the

[3] The defendants argue that the association should not be accorded standing because a judgment against it might not be binding upon its members. We see little likelihood that the defendants will suffer the burden of relitigating the claims raised in this case. The *stare decisis* effect of our decision provides the defendants with substantial protection against further litigation. In addition, the defendants would have the opportunity in any case brought by members of the association to argue that the members are bound by the *res judicata* effect of our decision in this case. *Cf. Aluminum Co. of America* v. *Admiral Merchants Motor Freight, Inc.,* 7 Cir. 1973, 486 F.2d 717, 720-21, *cert. denied,* 414 U.S. 1113; *Expert Electric, Inc.* v. *Levine,* 2 Cir. 1977, 554 F.2d 1227, 1232-35, *cert. denied,* 434 U.S. 903; *Spring Mills, Inc.* v. *Consumer Products Safety Comm'n,* 1977 D.S.C, 434 F.Supp. 416, 434; Restatement of Judgments §§ 80-85 (1942); Restatement of Judgments [2d] §§ 85-86 (Tent. Draft No. 2, 1975).

meat they carry is being unloaded at a point of delivery. These ordinances are invalid, the complaint asserts, because they are preempted by the Act. In addition, the complaint suggests that these ordinances impose an impermissible burden on interstate commerce. These allegations state a claim upon which relief can be granted. Therefore, the district court technically erred when it dismissed the complaint. That error is of no consequence, however.

The district court stated:

> Defendants argue that no effective preemption claim has been stated because the ordinances here in question do not conflict with the quoted portions of the Act. . . . [T]his Court agrees.
>
> Accordingly, defendants' Motion to Dismiss The Complaint is granted.

This passage from the court's opinion makes clear that it believed that there were no triable issues of fact and that, as a matter of law, the Act does not preempt the ordinances.[4] That finding called for entry of summary judgment in favor of the defendants, rather than dismissal of the complaint. *See* F.R. Civ. P. 56. Furthermore, in reaching its judgment the district court had before it, and presumably considered, several affidavits of municipal public health officials detailing information about the delivery vehicle inspections. Under F.R. Civ. P. 12(b), this consideration of materials outside the pleadings converted the district court's dismissal into a grant of summary judgment.

Under Federal Rules of Civil Procedure 12(b) and 56(c), the district court should have notified the association that it intended to treat the defendant's motion to dismiss as a motion for summary judgment. Furthermore, the court should have allowed the association a reasonable

[4] The district court did not address the commerce clause issue that might be suggested by the complaint.

opportunity to establish the existence of material controverted facts. *See Choudry* v. *Jenkins,* 7 Cir. 1977, 559 F.2d 1085, 1089, *cert. denied,* 434 U.S. 997; *Macklin* v. *Butler,* 7 Cir. 1977, 553 F.2d 525, 528 (per curiam); *Winfrey* v. *Brewer,* 8 Cir. 1978, 570 F.2d 761, 764. We call attention to this error for its prophylactic effect in future cases, but the error does not require reversal. If we assume the existence of all the facts alleged by the association, its challenges to the local ordinances fail nonetheless. We have concluded that the supremacy and commerce clauses allow municipalities to enact and enforce ordinances providing for the inspection of meat delivery vehicles at locations other than the premises of establishments regulated by the Act.

IV.

"No simple, mechanical formula can summarize the analysis necessary to determine whether a state statute is void under the supremacy clause." *Great Western United Corp.* v. *Kidwell,* 5 Cir. 1978, 577 F.2d 1256, 1274 (citing cases). The first inquiry must be whether Congress has prohibited state regulation of the commerce involved in this case:

> [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Jones v. *Rath Packing Co.,* 1977, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604. A federal law that does not exclude all state legislation nonetheless overrides state laws with which its (sic) conflicts. U.S. Const. art. VI. To ascertain whether the state law in question is fatally inconsistent with federal law, we must "determine whether . . .

[it] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Hines* v. *Davidowitz,* 1940, 312 U.S. 52, 67-68, 61 S.Ct. 339, 85 L.Ed. 581. *See Great Western,* 577 F.2d at 1274-75.

The association does not argue that, by passing the Act, Congress intended to occupy the whole field of meat inspection. Rather, the association asserts that language in the Act clearly conflicts with these local ordinances. To assess this claim, we must first review the applicable provisions of the Act.[5]

Far from intending to preempt the entire field of meat inspection, Congress actually designed the Act to "protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective". 21 U.S.C. §661(a). In brief, subchapter I of the Act provides meat inspection standards to be enforced by the Secretary of Agriculture. 21 U.S.C. § 601-624. Congress made a special finding that all products and animals regulated by subchapter I "are either in interstate or foreign commerce or substantially affect such commerce", 21 U.S.C. § 602. Yet to promote the dual goals of consumer protection and localized regulation of meat purity, Congress authorized the Secretary of Agriculture to cooperate with the states in developing and administering state meat inspection programs with requirements that are "at least equal to the provisions of subchapter I" of the Act. 21 U.S.C. § 661. Section 408 of the Act is the only provision relevant to this case that prohibits certain types of state regulation:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under

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[5] *See generally* Comment, *The Wholesome Meat Act and Intrastate Meat Plants,* 4 Creighton L. Rev. 86 (1970); Note, *The Wholesome Meat Act of 1967,* 2 Suffolk U.L. Rev. 256 (1968).

> subchapter I of this chapter, which are *in addition to, or different than* those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment.

21 U.S.C. § 678 (emphasis added).

The association argues that the local ordinances under attack in this case—which, we must assume, provide for inspection of meat delivery vehicles either while on their delivery routes or while unloading at the point of delivery—must fall because they are "in addition to, or different" from the inspection requirement of subchapter I of the Act. We disagree.

Under § 408, the states are barred only from developing regulations "in addition to, or different" from federal regulations applicable "to *premises, facilities and operations* of any establishment at which inspection is provided under subchapter I". 21 U.S.C. § 678 (emphasis added). This language demonstrates that state regulation "in addition to, or different" from the federal scheme is impermissible only on the site of the regulated establishment. The vehicle inspections at issue in this case, of course, occur beyond the premises of the association's members.

The association argues that the "operations" of regulated establishments extend beyond their premises. When we consider that word in the context of § 408, we do not believe that Congress intended to give it such an expansive meaning. The legislative history of § 408 confirms our conclusion. In its report on the bill that eventually became the Act, the Senate Committee on Agriculture and Forestry stated:

> Section 408 would exclude States, territories, and the District of Columbia from regulating *operations at plants* inspected under [subchapter] I . . . , but would permit them to impose . . . requirements consistent with Federal provisions as to other matters regulated under the act.

S. Rep. No. 799, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. Code Cong. & Ad. News 2188, 2207. The Senate Committee's commentary clearly indicates that the states may regulate meat delivery vehicles not on the premises of the regulated establishment so long as the state law is not inconsistent with the Act—that is, so long as it does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Hines* v. *Davidowitz*, 312 U.S. at 67-68. The ordinances at issue here create no such obstacle.

What we have said thus far disposes of the association's remaining assertions on the preemption issue. The association argues that three other provisions—§ 24 of the Act and two regulations promulgated by the Secretary of Agriculture that apply to the loading and transportation of meat, 9 C.F.R. §§ 308.9, 325.1(c) (1978)[6]—preempt the

[6] Section 24 of the Act provides:

> The Secretary may by regulations prescribe conditions under which carcasses, parts of carcasses, meat, and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, capable of use as human food, shall be stored or otherwise handled by any person, firm, or corporation engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or importing, such articles, whenever the Secretary deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Violation of any such regulation is prohibited. However, such regulation shall not apply to the storage or handling of such articles at any retail store or other establishment in any State or organized Territory that would be subject to this section only because of purchases in commerce, if the storage and handling of such articles at such establishment is regulated under the laws of the State or Territory in which such establishment is located, in a manner which the Secretary, after con-

local ordinances at issue in this case. These provisions simply set forth the standards to be used by federal officials carrying out the inspections allowed by the Act of facilities and delivery vehicles on the premises of the regulated establishments. By providing for delivery vehicle

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[6] (Continued)

sultation with the appropriate advisory committee provided for in section 661 of this title, determines is adequate to effectuate the purposes of this section.

21 U.S.C. § 624.

9 C.F.R. § 308.9 provides:

Products shall be protected from contamination from any source such as dust, dirt, or insects during storage, loading, or unloading at and transportation from official establishments.

9 C.F.R. § 325.1(c) states:

No person, engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, meat or meat food products capable of use as human food, or importing such articles, shall transport, offer for transportation, or receive for transportation in commerce or in any State designated under § 331.2 of this subchapter, any such meat or meat food product which is capable of use as human food and is not wrapped, packaged, or otherwise enclosed to prevent adulteration by airborne contaminants, unless the railroad car, truck, or other means of conveyance in which the product is contained or transported is completely enclosed with tight fitting doors or other covers for all openings. In all cases, the means of conveyance shall be reasonably free of foreign matter (such as dust, dirt, rust, or other articles or residues), and free of chemical residues, so that product placed therein will not become adulterated. Any cleaning compound, lye, soda solution, or other chemical used in cleaning the means of conveyance must be thoroughly removed from the means of conveyance prior to its use. Such means of conveyance onto which product is loaded, being loaded, or intended to be loaded, shall be subject to inspection by an inspector at any official establishment. The decision whether or not to

inspection away from the premises of these establishments, the ordinances at issue here obviously do not conflict with the standards embodied in these provisions.[7]

In summary, we conclude that the Act does not explicitly or impliedly preempt these local ordinances. In addition, we uphold the ordinances because they are not inconsistent with the Act. Indeed, as the district court pointed out, the ordinances further the purpose of the Act, the protec-

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[6] (Continued)

inspect a means of conveyance in a specific case, and the type and extent of such inspection shall be at the Program's discretion and shall be adequate to determine if product in such conveyance is, or when moved could become, adulterated. Circumstances of transport that can be reasonably anticipated shall be considered in making said determination. These include, but are not limited to, weather conditions, duration and distance of trip, nature of product covering, and effect of restowage at stops en route. Any means of conveyance found upon such inspection to be in such condition that product placed therein could become adulterated shall not be used until such condition which could cause adulteration is corrected. Product placed in any means of conveyance that is found by the inspector to be in such condition that the product may have become adulterated shall be removed from the means of conveyance and handled in accordance with § 318.2 (d) of this subchapter.

[7] This case is clearly distinguishable from *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604. In *Jones,* the Supreme Court held that the challenged state law was preempted because it was "different" from federal standards required by the Wholesome Meat Act. 430 U.S. at 531-32. Both the state law and the Act regulated the same thing, meat labeling. In contrast, in the case before us the federal law is silent on the subject of state regulation, the condition of delivery vehicles away from the premises of regulated establishments.

tion of the health and welfare of consumers. 21 U.S.C. § 602.[8]

V.

The commerce clause, U.S. Const. art. I, § 8, cl. 3, grants to Congress the power to regulate "Commerce with foreign Nations, and among the several States". This provision places limits upon state power to regulate commerce over which Congress has primary responsibility. *See, e.g., The Great Atlantic and Pacific Tea Co.* v. *Cottrell,* 1976, 424 U.S. 366, 370-71, 96 S.Ct. 923, 47 L.Ed.2d 55. When Congress passed the Act, it specifically determined that "all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce". 21 U.S.C. § 602. The question, then, becomes whether the local ordinances at issue here contravene the commerce clause.

Congress has the power to legitimate state regulation of interstate commerce that would otherwise be impermissible. *Southern Pacific Co.* v. *Arizona,* 1945, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915. *See generally* P. Brest, *Processes of Constitutional Decisionmaking* 219-22 (1975); G. Gunther, *Cases and Materials on Constitutional Law* 367-71 (9th ed. 1975); L. Tribe, *American Constitutional Law* 402-03 (1978). As our earlier discussion of the plain meaning and legislative history of § 408 of the Act makes clear, Congress intended to allow the states to regulate meat delivery by ordinances such as those at issue here. These ordinances would be valid under

[8] Inspection of meat delivery vehicles is a useful supplement to inspection of the meat they carry. Even if the vehicles are sanitary when they leave the regulated establishment, it is obvious that the meat they carry can become impure en route to the delivery point in a variety of ways. Indeed, the affidavit of a health official employed by the Village of Oak Park, one of the defendants, states that his inspections of vehicles have revealed the absence of malfunction of required refrigeration equipment and unsanitary storage of meat.

the commerce clause, even without such express congressional approval. The ordinances regulate evenhandedly to effectuate a highly legitimate local public purpose, and their effect on interstate commerce is not clearly excessive in relation to the local benefits brought about by their enforcement. *See, e.g., Pike* v. *Bruce Church, Inc.,* 1970, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed2d 174; *Great Western,* 577 F.2d at 1281-86.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 5, 1979.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN MINOR WISDOM, *Senior Circuit Judge*[*]
Hon. ROBERT A. SPRECHER, *Circuit Judge*

CHICAGO-MIDWEST MEAT ASSOCIATION,
Plaintiff-Appellant,

vs.

CITY OF EVANSTON, ET AL.,
Defendants-Appellees.

No. 78 1468

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 3144

ALFRED Y. KIRKLAND, *Judge.*

[*] The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

ORDER

The third from last line of footnote 7, page 11, of the slip opinion filed on December 14, 1978, as corrected by order of December 22, 1978, is changed to read:

"federal law is silent on the subject of state regulation, the"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 22, 1978.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

CHICAGO-MIDWEST MEAT ASSOCIATION,
Plaintiff-Appellant,

vs.

CITY OF EVANSTON, ET AL.,
Defendants-Appellees.

No. 78-1468

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 3144

ALFRED Y. KIRKLAND, *Judge.*

ORDER

The opinion filed on December 14, 1978, in the above-captioned matter, is corrected to read as follows:

Page 11, footnote 7: the third line from the bottom is changed to read:

"state regulation *of* the"

Page 11, footnote 8: the second line from the bottom is changed to read:

"*or* malfunction of required," etc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO-MIDWEST MEAT ASSOCIATION,
a not-for-profit corporation,
Plaintiff,

v.

CITY OF EVANSTON, a Municipal Corporation, VILLAGE OF SKOKIE, a Municipal Corporation, VILLAGE OF NILES, a Municipal Corporation, VILLAGE OF RIVER FOREST, a Municipal Corporation, CITY OF DES PLAINES, a Municipal Corporation, CITY OF ELGIN, a Municipal Corporation, CITY OF CHICAGO HEIGHTS, a Municipal Corporation, VILLAGE OF OAK PARK, a Municipal Corporation, VILLAGE OF MORTON GROVE, a Municipal Corporation, VILLAGE OF NORRIDGE, a Municipal Corporation, CITY OF HIGHWOOD, a Municipal Corporation, VILLAGE OF LAKE ZURICH, a Municipal Corporation,
Defendants.

No. 77 C 3144

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendants' Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure and plaintiff's Motion for a Preliminary Injunction pursuant to Rule 65, Federal Rules of Civil Procedure.

A. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff's Motion for a Preliminary Injunction seeks to restrain defendant municipalities and their agents from enforcing ordinances which require members of plaintiff to purchase and to display licenses which can be obtained only after inspection of meat trucks by the municipalities.

Plaintiff's Motion further seeks to restrain defendants from seizing or otherwise interfering with trucks used to transport meat to market.

Plaintiff argues that the licensing requirement imposed by defendant municipalities directly conflicts with a provision of the Federal Wholesome Meat Act of 1967, (the "Act") 21 U.S.C. § 678 which prohibits the imposition of regulations or inspection requirements which are "in addition to, or different than" those imposed under the Act.

After careful examination of the materials submitted by the parties, this Court holds that plaintiff's Motion for a Preliminary Injunction is denied. This Court finds that plaintiff has failed to demonstrate a likelihood of success on the merits of its claim that defendants' ordinances conflict with Federal legislation in the area.

The statute upon which plaintiff relies is 21 U.S.C. § 678. That statute provides, in pertinent part that:

> Requirements within the scope of this chapter with respect to *premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State . . . (emphasis added)

There is little case law interpreting this statute and in the absence of case authority, this Court looks to the language of the section to decide its scope and effect. *See Arkansas Valley Industries, Inc.* v. *Freeman*, 415 F.2d 713 (8th Cir. 1969).

Although it is clear from the statute that states may not impose additional inspection requirements at the *place of shipment*, it is not clear that the Act pre-empts inspections at the *ultimate destination* of the shipment, since Federal law does not provide for any inspection at that point.

Municipalities receiving the meat may make their own inspection of the meat and the vehicle transporting it consistent with the Act since inspection is not of the "premises, facilities and operations" of the plant. Further, such

an interpretation would allow municipalities to protect their citizens in the event that shipments from the plant at which they were inspected were in transit for a period of time, and contaminants introduced.

This Court finds that such an interpretation would foster the purposes of the Act to "protect the health and welfare of consumers" by eliminating "unwholesome, adulterated or misbranded" meat products. See 21 U.S.C. § 602. Under these circumstances, this Court holds that plaintiff has failed to clearly show that defendants' ordinances conflict with the Act and has therefore failed to show that it is likely to succeed on the merits of its claim.

Accordingly, plaintiff's Motion for a Preliminary Injunction is denied.

B. DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss the Complaint for failure to state a claim upon which relief can be granted. Defendants argue that no effective preemption claim has been stated because the ordinances here in question do not conflict with the quoted portions of the Act. For the reasons stated in Part A, above, this Court agrees.

Accordingly, defendants' Motion to Dismiss the Complaint is granted.

CONCLUSION

Plaintiff's Motion for a Preliminary Injunction is denied.

Defendants' Motion to Dismiss the Complaint is granted.

Enter /s/ ALFRED Y. KIRKLAND
ALFRED Y. KIRKLAND, *Judge*

Dated: March 8, 1978

No. 78-1399

In the

Supreme Court of the United States

OCTOBER TERM, 1978

CHICAGO-MIDWEST MEAT ASSOCIATION,
a not-for-profit corporation,

Petitioner,

vs.

CITY OF EVANSTON, a municipal corporation, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1399

CHICAGO-MIDWEST MEAT ASSOCIATION,
a not-for-profit corporation,

Petitioner,

vs.

CITY OF EVANSTON, a municipal corporation, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Nine of the twelve defendant municipalities/villages herein join to present this response to the Petition for Writ of Chicago-Midwest Meat Association. Joint respondents are the City of Evanston, City of Elgin, Village of Oak Park, Village of Skokie, Village of Morton Grove, City of Niles, City of Chicago Heights, City of Des Plaines, and Village of Norridge. These same parties joined in the defense below.

The petitioner seeks to invalidate the respective local ordinances under which the Municipalities carry out health inspections and licensing of food delivery vehicles. The claim of preemption is grounded upon the Federal Wholesome Meat Act. Because respondents believe petitioner has misstated the facts, the holding below, and the questions presented for review, these will be addressed in addition to the argument.

QUESTIONS PRESENTED

1. Whether the Federal Wholesome Meat Act of 1967, 21 U.S.C. 601 *et seq.* preempts public health ordinances promulgated under delegated state police powers and pursuant to which food (including meat) delivery vehicles are licensed and inspected by local health officials.

2. Whether the ordinances in question contravene the commerce clause of the United States Constitution, Article I, Section 8, cl. 3.

3. Whether the ordinances in question contravene the supremacy clause of the United States Constitution, Article VI, cl. 2.

4. Whether the Court of Appeals erred in upholding the Summary Judgment granted respondents by the District Court.[1]

ADDITIONAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, cl. 3.

> "The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

United States Code, Title 21, §602.

> "Meat and meat food products are an important source of the Nation's total supply of food. They

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[1] While mindful of the requirements of the Supreme Court Rule 40 that respondents may not "raise additional questions or change the substance of the questions already presented", we respectfully suggest: (a) that petitioner's question 1 contains a conclusion of fact about alleged daily federal vehicle inspections which allegation was not contained in petitioner's Complaint before the Court below, but was asserted in its Cross-Motion for Preliminary Injunction, the denial of which is not before this Court. Said allegation, therefore, cannot be among those assumed to be correct for purposes of reviewing the rulings on respondents' Motion for Dismissal/Summary Judgment; (b) that petitioner's question 2 contains in the first subclause petitioner's own conclusion of law that there was explicit preemption in the Wholesome Meat Act whereas this is actually an issue which would fit within their first question as to whether preemption exists; (c) that petitioner's question 3 is totally incorrect, the Court of Appeals having never "construed" the local ordinances complained of. At issue was whether the Wholesome Meat Act preempted local ordinances, the content and procedures of which were admitted true as pleaded for purposes of respondents' Motion to Dismiss/Summary Judgment.

are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers."

United States Code Title 21, §661(a).

"(a) it is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in

efforts by State and other Government agencies to accomplish this objective..."

STATEMENT OF CASE

This case was initiated by a complaint seeking declaratory and injunctive relief brought by petitioner, Chicago-Midwest Meat Association, ("Chicago-Midwest") on August 25, 1977. Chicago-Midwest sought to enjoin twelve (12) northern Illinois municipalities or villages ("Municipalities") from licensing and inspecting food delivery vehicles pursuant to their respective ordinances. Chicago-Midwest was acting as a representative plaintiff on behalf of its member "persons, firms, or corporations" located in the midwest and engaged in the manufacturing, processing, and wholesaling of meat food products. Petitioner claims that its members are governed by the Federal Wholesome Meat Act of 1967, 21 U.S.C. 601 *et seq.*, and that said Act preempts all municipal licensing and inspection of meat food product delivery vehicles.

Respondents' Motion to Dismiss presented four grounds: that the Complaint failed to state a claim upon which relief could be granted, that Chicago-Midwest was not the real party in interest, that the failure to join the actual companies or individuals whose vehicles were subject to the licensing and inspection activities complained of prevented the accord of complete relief, and that the Federal District Court should decline under comity principles to take the suit because a pending State (municipal) Court action (since decided) gave Chicago-Midwest a forum to present its defense of Federal preemption. The only ground being appealed to this Court is the granting of the Federal Rule of Civil Procedure 12b(6) Motion to Dismiss for Failure to State a Claim. Petitioner also

filed a Cross-Motion for Preliminary Injunction. Neither party requested evidentiary hearings on the Motion to Dismiss, nor on the Motion for Preliminary Injunction. On March 8, 1978 the District Court entered a memorandum opinion and order denying Chicago Midwest's Motion for Preliminary Injunction and granting the Municipalities' Motion to Dismiss. That order was appealed to the Seventh Circuit.

On the Motion to Dismiss the District Court had before it Evanston Ordinance 98-0-61, the affidavit of William Embry, Chief of Evanston's Division of Environmental Health, and a copy of the form used for delivery truck inspections within Evanston. The Village of River Forest attached to its separate brief in support of the Motion to Dismiss a copy of its Code, Section 14.1. Chicago-Midwest submitted no affidavits in opposition to the Motion to Dismiss.

Submitted with Evanston's memorandum opposing the Motion for Preliminary Injunction were the Embry affidavit and the affidavit of Steven J. Stevens, Evanston Health Inspector. Submitted by the City of Oak Park with its memorandum opposing the Preliminary Injunction Motion was the affidavit of its Health Director, James D. Tills. River Forest submitted the affidavit of Dr. Charles Weigel, its Health Commissioner, along with a list of inspections carried out by the Village.

The affidavits of the Municipalities were specific. Dr. Weigel stated that to his knowledge no food delivery vehicles were inspected by the United States Department of Agriculture within the boundaries of River Forest and that there was a necessity to inspect delivery vehicles delivering to retail stores within the Village of River Forest

to be certain that spoilage and contamination had not occurred. Oak Park Health Director James D. Tills reported inspection findings of storage refrigeration temperatures higher than the state maximum, delivery of an illegal preservative, and unwrapped meat on the floor of a truck.

Evanston Inspector Stevens stated that inspections were carried out when the vehicles stopped to deliver, that they took from five to ten minutes, that no citations were issued, and that the trucks were never seized. Mr. Stevens further stated that the purpose of these inspections was to ascertain that the products were not spoiled or contaminated by vermin, dirt, leakage, and temperature changes. Not one counter-affidavit in reply to any municipal affidavits was submitted by petitioner.

The "Statement of Facts" in the Petition for Writ repeats the allegations from the petitioner's Complaint below and from affidavits that had been submitted in support of petitioner's Cross-Motion for Preliminary Injunction, but it does not even refer to the Motion to Dismiss ruled on by the District Court, to its attachments, or to the affidavits of the other local health officials referred to above that were before the District Court in opposition to petitioner's Cross-Motion for Preliminary Injunction.

The District Court, in granting the Motion to Dismiss, held that "no effective preemption claim has been stated because the ordinances here in question do not conflict with the quoted portions of the Act".[2] The Court of Appeals held that summary judgment was proper in face of the District Court's finding of no triable issues of fact

[2] Petition for a Writ of Certiorari, 78-1399 at 17a.

and its holding that as a matter of law the Act did not preempt the ordinances. The Court of Appeals further stated that:

> "If we assume the existence of all the facts alleged by the association, its challenges to the local ordinances fail nonetheless. We have concluded that the supremacy and commerce clauses allow municipalities to enact and enforce ordinances providing for the inspection of meat delivery vehicles at locations other than the premises of establishments regulated by the Act."[3]

Finally, the Court of Appeals examined the Congressional history of the Act and specifically of Section 678[4] and concluded that "far from intending to preempt the entire field of meat inspection, Congress designed the Act to "protect the consuming public from meat and meat food products that are adulterated or misbranded, and to assist in efforts by State and other Government agencies to accomplish this objective. 21 U.S.C. 661(a)"[5]

[3] 7th Circuit Opinion, page 6a of Petition for a Writ.

[4] Denominated Section 408 in the Predecessor Statute, 21 U.S.C. 71 *Et seq.* and frequently referred to as Section 408 by the Court of Appeals and in the Petition.

[5] Petition for a Writ at p. 7a.

ARGUMENT FOR DENIAL OF THE WRIT

The Petition for Writ should be denied. The decision of the Court of Appeals was fundamentally correct and consistent with the many recent and past cases wherein the Supreme Court analyzed and set the perimeters for evaluating preemption attacks on state sovereign police power enactments. The Court of Appeals examined the language of the Wholesome Meat Act, the many expressions of policy found throughout the Act, and the intent of Congress as reflected in Committee notes.

Respondents believe that this case does present an issue of great importance, the resolution of which impacts on long-established public health protective ordinances which are common to municipalities across the country. If the Court does decide to grant the Writ it should not permit certain unsupported gratuitous conclusions of the petitioner to cloud the fundamental issues properly presented, brought up, and now before it. The petitioner claims detriment because the Court of Appeals did not have before it the ordinances of each respondent Municipality. But for purposes of granting the Summary Judgment, all of petitioner's well-pleaded allegations as to the procedures and effect of the Municipalities' ordinances on petitioner's members' operations were taken as proven. The Court of Appeals did have before it the ordinances of Evanston and River Forest, and the Municipalities never disputed that they conduct inspections during unloading or delivery of food from vehicles within their boundaries.[6]

[6] While the Court of Appeals accepted the unsupported comments made by petitioner's counsel in oral argument, (see footnote 2 of decision at p. 3a of Petition for Writ) the Municipalities have always denied that they stop vehicles merely proceeding through their limits en route to extra-territorial locations. Moreover, this allegation

I

THE COURT OF APPEALS CONSIDERED BOTH THE STATUTORY LANGUAGE AND ITS LEGISLATIVE HISTORY.

Petitioner argues that because its member organizations operate federally-inspected meat processing "establishments", the vehicles loaded at and subsequently transporting meat many miles and possibly days removed from those establishments cannot be inspected by municipal health officials. Petitioner bases its claim primarily on one sentence in Section 678 of the Federal Wholesome Meat Act. The sentence reads:

> "Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment." 21 U.S.C. 678, (21 U.S.C. 408, 1902)

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[6] (Continued)
was contained in petitioner's Cross-Motion for Preliminary Injunction but not in petitioner's Complaint so it is not properly before the Court on this appeal. It is an illogical claim lacking any supporting evidence and unbacked by affidavits of any kind. Indeed it was directly contradicted by the specific affidavits of River Forest Official Weigel and Evanston Official Stevens, affidavits never countered by petitioner.

The Court of Appeals considered petitioner's argument that "operations" of regulated establishments extend beyond their premises:

> "when we consider that word in the context of section 408, we do not believe that Congress intended to give it such an expansive meaning. The legislative history of §408 confirms our conclusion . . . the Senate Committee on Agriculture and Forestry stated: 'Section 408 would exclude States . . . from regulating *operations at plants* inspected under (subchapter) 1 . . .'". (emphasis added by Court of Appeals, unreported opinion 78-1468, Dec. 14, 1978 at p. 8a, Petition for Writ)

In refusing the "expansive" meaning sought by petitioner, the Court of Appeals followed the rule of statutory construction that words are to be given their plain and ordinary meaning "in the absence of persuasive reasons to the contrary". *Banks* v. *Chicago Grain Trimmers Association,* 1968, 390 U.S. 459, 465, 88 S.Ct. 1140, 20 L.Ed. 30, rehearing denied 88 S.Ct. 1800, 391 U.S. 929, 20 L.Ed. 2d 671. It also followed the procedure, properly used when doubt exists, of recourse to reports of Committees of Congress to ascertain legislative intent. See *FTC* v. *Manager, Retail Credit Co., Miami Branch Office, C.A.D.C.,* 1975, 515 F.2d 988.

Moreover, that plant site inspection programs constituted the primary thrust of the statute has been a generally accepted conclusion: "The general aim of this new Act was to require that *all* meat plants, whether interstate or intrastate, be subjected to the same inspection standards and maintain substantially the same facilities". 4 *Creighton Law Review* 86. See also letter to Senate President Hubert Humphrey of February 23, 1967 from

Acting Secretary of Agriculture Schnittker. U.S. Code Cong. & Ad News 2210.

The Court of Appeals, having both determined the "plain and ordinary meaning" of the phrase "premises facilities and operations" and examined the legislative history of the section, reached the only consistent and plausible statutory interpretation.[7]

II

THE REGULATIONS PROMULGATED UNDER THE ACT ALSO SUPPORT THE COURT OF APPEALS' HOLDING

Because the Court held that the statute itself does not preempt the ordinances, there was no necessity to also examine the regulations promulgated under the statute. Nonetheless, the Court of Appeals did look to the regulations and found that:

> "these provisions simply set forth the standards to be used by federal officials carrying out the inspections allowed by the Act of facilities and delivery vehicles on the premises of the regulated establishments. By providing for delivery vehicle inspection away from the premises of these establishments, the

[7] The Court of Appeals examined 21 U.S.C. 661(a) which states that "it is the policy of Congress to protect the consuming public from meat and meat food products that are adulterated . . . and to assist in efforts by state and other government agencies to accomplish this objective". The District Court had examined 21 U.S.C. 602 and also concluded that action by the state was contemplated. See p. 17a of Petition for a Writ.

> ordinances at issue here obviously do not conflict with the standards embodied in the provisions."[8]

The Court's holding squarely fits with the content of the regulations. Regulation 9 C.F.R. 325.1(c), provides standards for the transportation of meat/food products. The regulation does describe the sanitary requirements of the means of conveyance and does discuss enclosures, sealing, and refrigeration. But it *also* states:

> "The decision whether or not to inspect a means of conveyance in a specific case and the type and extent of such inspection *shall be at the Program's discetion* and shall be adequate to determine if the product in such conveyance is, or *when moved could become, adulterated.*" 9 C.F.R. 325.1(c), sentence five. (emphasis added)

Yet petitioner would base its claim that it should be free from "local interference" on a regulation that baldly states that there is *discretion* within the federally approved establishment as to the nature and extent of inspection of conveyances prior to their departure and that actually *contemplates* the problem of adulteration occurring en route. Respondents also respectfully refer this Court to our discussion of these and other regulations at pages 8-9 of their defendants-appellees' brief before the Seventh Circuit.

III

DECISION OF COURT OF APPEALS FOLLOWS CONSISTENT PAST AND RECENT HOLDINGS BY THIS COURT.

The decision below is completely in accord with the many cases where the Supreme Court has repeatedly sustained the

[8] P. 10, Court of Appeals, supra.

fundamental and traditional state sovereign police powers to protect health. The preemption test for state regulations promulgated under this power is a stringent one:

> "Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was the 'clear and manifest purpose of Congress' would justify a conclusion that state authority to regulate in areas of vital state interest is preempted." *DeCanas* v. *Bica,* 1976, 424 U.S. 351, 47 L.Ed. 2d 43, 96 S.Ct. 933, quoting *Florida Lime and Avocado Growers,* infra.

The Court addressed an interstate commerce preemption attack on a state statute that forbid price advertising of eyeglasses. The Court acknowledged that the State Supreme Court injunction against the advertising:

> "has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce . . . In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that Constitution when 'conferring upon Congress the regulation of commerce . . . never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country' . . ." *Head* v. *Board of Examiners,* 1963, 374 U.S. 421, 427, 428, 10 L.Ed. 2d 983, 83 S. Ct. 1963, quoting *Huron Portland Cement Co.* v. *Detroit,* infra.

The Court of Appeals in reaching its decision acted consistently with the Supreme Court's balancing approach as expressed in *Head,* and analyzed the relative burden on interstate commerce posed by respondents' food vehicle inspection ordinances:

> "The ordinances regulate evenhandedly to effectuate a highly legitimate local public purpose and their effect on interstate commerce is not clearly excessive in relation to the local benefits brought about by their enforcement." (7th Cir. pg. 13a, Petition for Writ).

Major local "interference" with commerce has been upheld where the public health was at stake in a case where the preemption attack concerned a municipal smoke abatement ordinance enforced against a federally licensed, inspected and approved cement vessel in interstate commerce.

> "the ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Huron Portland Cement Co.* v. *Detroit,* 1960, 362 U.S. 440, 442, 4 L.Ed.2d 852, 80 S.Ct. 813.
>
> "In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be . . . . implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State'." *Huron Portland Cement,* supra, 362 U.S. 443, quoting *Savage* v. *Jones,* 1912, 225 U.S. 501, 533, 56 L.Ed. 182, 32 S.Ct. 715.

The public health and local interest in food product purity has also been addressed on several occasions by the Court. It recognized that "the supervision of the readying of foodstuffs for markets has always been deemed a matter of peculiarly local concern" in a supremacy clause attack by Florida avocado growers upon a California statute requiring a higher minimum oil content in avocados than federally-allowed Florida standards.

> "There is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 1963, 373 U.S. 123, 10 L.Ed. 2d 248, 83 S.Ct. 1210, rehearing denied 374 U.S. 132, 10 L.Ed. 2d 248, 83 S.Ct. 1861.

As far back as 1902 this Court supported a state health police power statute in the face of an attack by the owner of cattle that were federally certified to be free from infectious diseases. The plaintiff cattle owner refused to submit his stock to state inspection for a certificate under a Colorado law which he argued was repugnant to the commerce clause. The Supreme Court agreed that the transportation of livestock from state to state was a "branch of interstate commerce" and that any lawful Congressional regulation would be paramount. However, the Court found that the federal statute in question did not cover "the whole subject of the transportation of livestock, and left a wide field for the exercise by the states of their power by appropriate regulations to protect their domestic animals against contagious, infectious and communicable diseases." *Reid* v. *Colorado,* 1902, 187 U.S. 137, 147. See also *Mintz* v. *Baldwin,* 1933, 289 U.S. 346.

Respondents submit that the Court of Appeals' finding herein was virtually analagous. The Wholesome Meat Act simply does not "legislate" in the area of delivery site vehicle inspection covered by the municipal ordinances. If there were two "schemes of regulation" (which there are not because of the discretionary nature of vehicle inspections under regulation 325.1, see discussion at p. 13) both could stand. The Court also found no constitutional infirmities.

IV

COURT OF APPEALS' DECISION PROPERLY DISTINGUISHES JONES V. RATH, WHERE THERE WAS SPECIFIC PREEMPTION LANGUAGE FOR PACKAGE LABELING.

Petitioner argues that the decision of this Court in *Jones* v. *Rath Packing Company,* 1977, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 calls for reversal of the ruling in this case. However, petitioner has consistently and inexplicably ignored the unavoidable reality that the issue before the Court in that case was the contents of labels and that such topic has its *own* language in the same section of the statute, immediately following the sentence that petitioner cites. The Court of Appeals made and noted this crucial distinction in its decision.[9] The second sentence upon which the *Jones* v. *Rath* conclusion was based reads:

> "Marking, labeling, packaging or ingredient requirements in addition to or different than, those made under this Act, may not be imposed by any state or territory . . . with respect to articles prepared at any establishment under inspection in accordance with the requirement under this Act."

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[9] Petition for Writ at p. 11a, Footnote 7.

Therefore, the conclusion of the Court in *Jones* v. *Rath* has no relevance for the facts and law of this case. Because of the explicit preemption language concerning meat package labeling, the Supreme Court properly proceeded in that case to the second step analysis of whether the state label requirements were "in addition to or different than" the label requirements under federal regulation. That "second step" analysis is never reached or called for here. Moreover, petitioner's effort to utilize the words of Section 624, "transporting in or for commerce", which describe the "persons, firms or corporations" *subject* to the storage and handling regulations, to argue that the transportation itself is a separate subject of regulation simply is without logic.

Petitioner argues that the fact that the Wholesome Meat Act is "silent" on the issue of off-premises vehicle inspection is a "neutral" fact not to be interpreted as allowing off-premises inspections. What the petitioner ignores, but the Court of Appeals did not, is the decidely non-neutral language in the same section indicating a Congressional intent to maintain the traditional police power role of states, and to enlist state/local enforcement. Section 678 specifically permits concurrent jurisdiction for purposes of "*preventing distribution of adulterated or misbranded articles*", and as the Court of Appeals noted, the affidavits of municipal officials showed that adulterated meat has been found during the local inspections.[10]

Petitioner submits that "the Court brought to bear the test giving the greatest latitude to state regulation when it should have applied the (allegedly explicit pre-emption) test laid down by this Court in *Jones*.[11] Again, the "test"

[10] Petition for a Writ, at p. 12a, Footnote 8.

[11] Petition for a Writ, at p. 17.

in *Jones* required examination of the state labeling requirements in light of *specific* federal prohibitory language against different or additional labeling. Petitioner then argues that the legislative history which the Court of Appeals relied upon in defining the terms "establishment" and "operations" is based on "neutral" language in the Senate Committee report. But the report on Section 408 stated:

> "Section 408 would exclude states, territories and the District of Columbia from *regulating operations at plants* inspected under Title I. (emphasis added) S. Rep. No. 799, 90th Cong., 1st Session, reprinted in 1977, U.S. Code Cong. and Ad News 2188, 2207.

The word "operations" thus was actually tied into the plant location by the Senate Committee. Nothing could be clearer, or less "neutral".

Petitioner talks vaguely about different levels or degrees of preemption and argues that the Court of Appeals used a "narrow implicit preemption test" that gave the greatest latitude to a favorable finding for the municipal powers. Nowhere is this argument borne out in reading the decision. The Court of Appeals unequivocally held that "the Act does not explicitly or impliedly preempt these local ordinances", not did it find the activities barred under the commerce and supremacy clauses. Moreover, for traditional state police power activities the Supreme Court has, as analyzed above, followed a consistent approach giving such latitude, absent explicit language.

V

THERE WAS NO ISSUE LEFT FOR BRIEFING AND ALL OF PETITIONER'S ALLEGATIONS WERE PRESUMED TRUE.

Petitioner argues that neither it nor respondents were given an opportunity to fully explore and brief "the issues the Court (of Appeals) dealt with". Respondents do not know to what issues petitioner refers. The Court of Appeals did state that petitioner's allegations before the District Court stated a claim upon which relief could be granted and did also state that the District Court "technically" erred in dismissing the Complaint. By technical error it meant that because the Motion to Dismiss was converted into a Motion for Summary Judgment by the presence of and consideration of materials outside of the pleadings the Court should have informed the plaintiff "that it intended to treat the defendant's Motion to Dismiss as a Motion for Summary Judgment". That is the only error which the Court addresses. But the Court of Appeals *also* stated that "taking all of plaintiff's allegations as true for purposes of ruling on the Motion to Dismiss, plaintiff's challenges fail nonetheless. In view of this absolutely clear ruling, what could petitioner "fully explore and brief"? The best it could have done would be to prove all of its allegations, the truth of which was *presumed* for purposes of respondents' Motion to Dismiss. Petitioner had before it the same Federal Rules of Civil Procedure 12 and 56 available to respondents, yet it never even countered respondents' affidavits, the contents of which were therefore left unchallenged.[12]

As for petitioner's complaint that the Court of Appeals did not have before it ordinances of eleven (in reality ten) of the twelve Municipalities, it is very late for such a protest from petitioner, who brought an allegedly verified Complaint before the District Court, yet never made efforts to obtain the ordinances whose contents presumably were the basis for the entire Complaint. To repeat, all of petitioner's allegations as to the activities carried out under the "absent" ordinances were *taken* as true, yet now petitioner claims prejudice because the Court did not consider the actual documents that the petitioner never at any stage sought to place before it. This is a bad faith argument.

CONCLUSION

The decision of the Court of Appeals is correct. It provides both a logical interpretation of the statutory language and a correct analysis from the viewpoint of the legislative history and expressed Congressional policy. It is consistent with the Supreme Court's historical and recent analysis of cases where statutory and constitutional preemption claims were brought against state police power enactments.

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[12] "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Federal Rule of Civil Procedure 56(e).

There is no conflict with this Court's decision in *Jones* v. *Rath,* supra., and that case was clearly distinguishable under the statute itself. Finally, petitioner was not denied any procedural rights and there is no cause for remand.

The Petition for Writ is inaccurate and misleading. It did not address the language in Section 678 that was the basis for the *Jones* v. *Rath* decision. It omitted to mention or describe the municipal material that was before the Court on its rulings, and it restricted its Statement of Facts to the contents of its allegations and its Motion for Preliminary Injunction.

For these reasons the joint named respondents request the denial of the Writ for Certiorari.

Respectfully submitted,

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NO. 78-1399

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

CHICAGO-MIDWEST MEAT ASSOCIATION, a not-for-profit corporation,

Petitioner,

v.

CITY OF EVANSTON, a municipal corporation, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Citations

Cases:

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CITY OF EVANSTON, a municipal corporation, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This response is filed on behalf of the VILLAGE OF RIVER FOREST (RIVER FOREST), one of the respondents.

River Forest Ordinances

Village of River Forest Code-1957
Chapter 14. Food and Food Establishments.

Sec. 14.2. General sanitary requirements for food establishments and restaurants.

Item 13. Refrigeration.

(a) All readily perishable food or drink shall be kept at or below fifty degrees Fahrenheit, except when being prepared or served. This shall include all custard-filled and cream-filled pastries, milk and milk products, egg products, meat (including canned hams marked "Perishable" or "Keep under Refrigeration"), fish, shellfish, gravy, poultry and salads containing meat, fish, potatoes, eggs or milk or milk products. Raw meats shall be stored at or below forty degrees Fahrenheit.

* * *

Item 14. Storage, transportation, display and serving of food and drink. All food and drink shall be so stored, transported, displayed and served as to be protected from dust, flies, vermin, depredation and pollution by rodents, unnecessary handling, droplet infection, overhead leakage and other contamination, and shall at no time be kept in an unclean, unhealthful or unsanitary condition. No animals or fowl shall be kept or allowed in any room in which food or drink is prepared or stored. All means necessary for the elimination of flies, roaches and rodents shall be used.

* * *

ARTICLE II. Wholesale Food Itinerant Vendors

Sec. 14.24. Definition.

The term "wholesale food itinerant vendor" is hereby defined to mean any person not operating a regularly established store for the merchandising of foods, that shall, by traveling from place to place upon the public ways, deal, sell, offer for sale or deliver at wholesale from any vehicle for purposes of resale any article of food, confection, condiment, or drink used or intended for human consumption, or any article which is an ingredient of any such food, confection, condiment or drink.

Sec. 14.26. License required.

No person shall act as a wholesale food itinerant vendor without first having obtained a license therefor. Applications for licenses under this article shall give the address of the itinerant vendor and such other information as may be required by the health commissioner. The health commissioner shall cause an investigation to be made of the vehicle used or to be used, for the purpose of determining its fitness and suitability from a sanitary standpoint.

Sec. 14.27. License fee.

The annual fee for a wholesale food itinerant vendor shall be fifteen dollars for each vehicle used in said business.

Sec. 14.28. Emblems for vehicles.

Every person licensed as a wholesale itinerant vendor shall obtain from the village clerk at the time he procures his license a metal plate or other suitable emblem for each vehicle used in the

business. Said plate or emblem shall have plainly stamped or marked thereon the words "River Forest Wholesale Food Itinerant Vendor."

Sec. 14.29. Inspection.

The health commissioner shall cause an inspection to be made periodically of all vehicles of wholesale food itinerant vendors, to determine whether said vehicles comply with all health, sanitation and safety requirements.

Statement of the Facts

Petitioner's Statement of Facts makes no reference to the RIVER FOREST ordinance. The ordinance licenses and provides for inspection of food delivery vehicles under Sections 14.1(a), 14.2, 14.12, and 14.25 through 14.29 of THE RIVER FOREST CODE OF 1957, as amended. These provisions provide that the health commissioner has the right to inspect vehicles delivering food to retail stores for resale in order to determine that all health, sanitation, and safety requirements are observed. The ordinance further provides that food shall be so stored as to be protected from dust, flies, vermin, depredation and pollution by rodents, unnecessary handling, droplet infection, overhead leakage

and other contamination. The fee for the license is $15 a year, and the penalty for violation is by fine only.

The ordinance has been on the books of RIVER FOREST for over 30 years, and until this suit was filed there never was any objection to the enforcement of the ordinance. Petitioner has been unable to show any damages incurred by members of the petitioner association by submitting to the vehicular inspections in River Forest. At the time this litigation was brought by the petitioner, and as of the present date, there have been no suits filed against members of the petitioner association by RIVER FOREST because of lack of compliance by the members with the ordinance.

There was no request by either party for evidentiary hearings on the Motion to Dismiss nor on petitioner's Motion for Preliminary Injunction. The Statement of Facts of the petitioner makes no reference to the facts contained in RIVER FOREST's

affidavit. RIVER FOREST submitted the affidavit of Dr. Charles J. Weigel, its health commissioner for many years, along with a list of the inspections carried out by RIVER FOREST. Dr. Weigel's affidavit is specific in that it states that to his knowledge no food delivery vehicles were inspected by the U. S. Department of Agriculture within the boundaries of River Forest. Dr. Weigel further states that it was requisite to make inspections of delivery vehicles to retail outlets within the Village of River Forest so as to be careful that the food was not spoiled or otherwise contaminated. It is important to note that no counter-affidavits were filed by petitioner in reply to RIVER FOREST's affidavit.

Reasons for Denying the Writ

I

THE DECISION OF THE U. S. COURT OF APPEALS DOES NOT CONFLICT WITH EXISTING LAW.

As the Seventh Circuit and the U. S. District Court so properly held, there is nothing in the

Federal Wholesome Meat Act of 1967 (21 U.S.C., Section 678) which prohibits the imposition of regulations or inspection requirements which are not in addition to or different than those imposed under the Act. The federal law does not provide for any inspection at the point of ultimate destination of the shipment as the District Court points out in its Order.

As has been said in the brief of EVANSTON and the other villages, Sections 674 and 678 of 21 U.S.C. squarely support the District Court's decision. Petitioner had argued that 21 U.S.C., Section 624 provides for preemption by the federal government and that Section 624 prohibited regulation in any way by local governments of the transportation of meat food products. As the EVANSTON brief states on page 10, Section 624 contains specific authorization for regulation under the laws of the "State or territory in which such establishment is located ..." The whole point is that RIVER FOREST may legally

inspect at the point of delivery and federal authorities do not and have not.

Under the Illinois Municipal Code, Division 11, Chapter 24, Sections 11-20-1 through 11-20-5, et seq., Ill. Rev. Stat., a municipality has the right to regulate delivery and sale of food. RIVER FOREST has been delegated the power to regulate the inspection of all food and to do all necessary acts and make all regulations ". . . which may be necessary or expedient for the promotion of health. . . ." (Ch. 24, Sec. 11-20-5.) It is further provided that the corporate authorities of RIVER FOREST may establish and regulate markets and market houses. (Ch. 24, Sec. 11-20-1.) With specific statutory authority and delegation of power, it is obvious that RIVER FOREST has the power and the right to enforce its ordinances against the members of the petitioner trade association.

It is submitted that RIVER FOREST is clearly within its rights in providing for inspection of the

delivery trucks as they arrive in River Forest. The inspections usually take place at retail stores and restaurants located in River Forest. River Forest is a suburb of Chicago, 10 miles west thereof, with population of about 13,500. If a meat delivery truck, while en route to River Forest, suffers a breakdown in its refrigeration equipment and the temperature rises so as to effect meat spoilage,only RIVER FOREST would be in a position to inspect this vehicle on a governmental level. There is no kind of federal inspection that would help in this type of situation. Petitioner readily admits that villages may impose regulations only if they are not in addition to or different than those provided for in the federal law. The statute says so and the lower court has said so. It is certainly obvious that RIVER FOREST's ordinances are valid and do not conflict with the federal regulations and law promulgated under the Wholesome Meat Act of 1967 or under any other federal law. As the U. S. District

Court has said, the ordinances would foster the purposes of the Act "to protect the health and welfare of consumers by eliminating unwholesome, adulterated or misbranded meat products."

The petitioner persists in arguing that Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L. Ed. 2d 604, and Rath Packing Co. v. Becker, C.A. 9th 1975, 530 F.2d 1295, have meaning and are controlling in the disposition of this litigation. It is submitted that those decisions relate to both County of Los Angeles and U. S. weight labeling regulations and have nothing to do with the facts at issue; therefore, those decisions have no application to the case at bar. As the U. S. Court of Appeals said in its opinion at page 11(a):

> "This case is clearly distinguishable from Jones v. Rath Packing Co., 430 U. S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604. In Jones, the Supreme Court held that the challenged state law was preempted because it was 'different' from federal standards required by the Wholesome Meat Act, 430 U.S. at 531-32. Both the state law and the Act regulated the same thing, meat labeling.

> In contrast, in the case before us the federal law is silent on the subject of state regulation, the condition of delivery vehicles away from the premises of regulated establishments."

II

THE LOWER COURT WAS CORRECT IN TREATING MOTION TO DISMISS AS MOTION FOR SUMMARY JUDGMENT.

The Court granted the respondents' Motion to Dismiss and that Motion was treated as a motion for summary judgment as a result of the Court's examination of material submitted by the parties (Memorandum Opinion A-7). This procedure is provided for in the following Rule 12(b) of the Federal Rules of Civil Procedure:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The petitioner was not hurt by not introducing counter-affidavits. As the U. S. Court of Appeals in its opinion said at page 6(a):

> "If we assume the existence of all the facts alleged by the association, its challenges to the local ordinances fail nonetheless. We have concluded that the supremacy and commerce clauses allow municipalities to enact and enforce ordinances providing for the inspection of meat delivery vehicles at locations other than the premises of establishments regulated by the Act." (Emphasis added.)

The petitioner's third reason for granting the Writ, namely that petitioner was prejudiced because it did not introduce counter evidence, has no merit. Even if evidence were introduced, as the U. S. Court of Appeals said, the result would have been the same because there was no preemption, no conflict with federal law, and the ordinances did not contravene the commerce clause of the United States Constitution.

CONCLUSION

For the above reasons, the Writ of Certiorari

should be denied.

Respectfully submitted,

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